

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

GAN H. ENG, ET AL.,

Plaintiffs,

vs.

**THE NICE RESTAURANT, INC., BEN H. TOM,
MEE MEE TOM, ET AL.,**

Defendants.

BEN H. TOM,

Cross-Claimant,

vs.

MEE MEE TOM,

Cross-Claim-Defendant.

BEN H. TOM,

Counter-Claimant,

vs.

GAN H. ENG, ET AL.

Counterclaim-Defendants.

ECF

07 CIV 3909 (MGC)

**BEN H. TOM'S
ANSWER, CROSS-CLAIM AND
COUNTERCLAIM**

Defendant Ben H. Tom, by Freeman Lewis LLP, his attorneys of record, answers the Complaint and asserts a Cross-Claim and Counterclaim, as follows:

1. Denies each and every averment contained in paragraph 1, except admits that the proceeding purports to be one to recover damages for violation of Federal and New York labor laws governing minimum wages, overtime pay and the ownership of gratuities.

2. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 2 and therefore denies each and every averment contained in paragraph 2, except admits that for a period of time outside the relevant period Ben H. Tom owned shares in the Nice Restaurant.

3. Denies the averments respecting Ben Tom, denies information sufficient to form a belief as to the truth of the averments respecting the other defendants and therefore denies each and every averment contained in paragraph 3.

4. Denies the averments respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments respecting the other defendants and therefore denies each and every averment contained in paragraph 4.

5. Denies the averments respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 5, and therefore denies each and every averment contained in paragraph 5.

6. Denies the averments respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 6, and therefore denies each and every averment contained in paragraph 6.

7. Denies the averments respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 7, and therefore denies each and every averment contained in paragraph 7.

8. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 8, and therefore denies each and each and every averment contained in paragraph 8.

9. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 9, and therefore denies each and each and every averment contained in paragraph 9.

10. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 10, and therefore denies each and each and every averment contained in paragraph 105.

11. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 11, and therefore denies each and each and every averment contained in paragraph 11.

12. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 12, and therefore denies each and each and every averment contained in paragraph 12.

13. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 13, and therefore denies each and every averment contained in paragraph 13.

14. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 14, and therefore denies each and each and every averment contained in paragraph 14, except admits that in Chinese languages family names are usually written first.

15. Denies each and each and every averment contained in paragraph 15, except admits that The Nice Restaurant, Inc. is a New York corporation.

16. Denies each and each and every averment contained in paragraph 16, except admits that for a period of time in the past The Nice Restaurant, Inc. operated a restaurant

that did business under the name “The Nice Restaurant” at 35 East Broadway, New York, New York.

17. Denies each and each and every averment contained in paragraph 17, except admits that for a period of time outside the relevant period Ben Tom owned shares in The Nice Restaurant and was the Chairman of the Board.

18. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 18 and therefore denies each and every averment contained in paragraph 18, except admits that defendant Mee Mee Tom was for a period of time a shareholder and manager of the Nice Restaurant.

19. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 19 and therefore denies each and every averment contained in paragraph 18.

20. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 20 and therefore denies each and every averment contained in paragraph 20.

21. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 21 and therefore denies each and every averment contained in paragraph 21.

22. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 22 and therefore denies each and every averment contained in paragraph 22.

23. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 23 and therefore denies each and every averment contained in paragraph 23.

24. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 24 and therefore denies each and every averment contained in paragraph 24.

25. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 25 and therefore denies each and every averment contained in paragraph 25.

26. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 26 and therefore denies each and every averment contained in paragraph 26.

27. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 27 and therefore denies each and every averment contained in paragraph 27.

28. Denies each and every averment in paragraph 28 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 28 respecting the other defendants, and therefore denies each and every averment contained in paragraph 28, except admits that in the paragraphs of the Complaint 30 to the end plaintiffs purport to refer to defendants and defendant Nice Restaurant Inc as "Employer Defendants."

29. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 29 and therefore denies each and every averment contained in paragraph 29.

30. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 30, and therefore denies each and every averment contained in paragraph 30.

31. Denies each and every averment contained in paragraph 31 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments respecting the other defendants, and therefore denies each and every averment contained in paragraph 31.

32. Denies each and every averment in paragraph 32 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 32 respecting the other defendants, and therefore denies each and every averment contained in paragraph 32.

33. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 33, and therefore denies each and every averment contained in paragraph 33.

34. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 34, and therefore denies each and every averment contained in paragraph 34

35. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 35, and therefore denies each and every averment contained in paragraph 35.

36. Denies each and every averment in paragraph 36 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 36, and therefore denies each and every averment contained in paragraph 36.

37. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 37, and therefore denies each and every averment contained in paragraph 37.

38. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 38 and therefore denies each and every averment contained in paragraph 38.

39. Denies each and every averment in paragraph 39 respecting Ben Tom. He denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 39 as to the other defendants, and therefore denies each and every averment in paragraph 39 respecting the other defendants.

40. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 40, and therefore denies each and every averment contained in paragraph 40.

41. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 41, and therefore denies each and every averment contained in paragraph 41.

42. Denies each and every averment in paragraph 42 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 42 as to the other defendants, and therefore denies each and every averment in paragraph 42 respecting the other defendants.

43. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 43, and therefore denies each and every averment in paragraph 43, except admits that from time to time customers left gratuities after dining at The Nice Restaurant.

44. Denies each and every averment in paragraph 44 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in

paragraph 44 as to the other defendants, and therefore denies each and every averment in paragraph 44 respecting the other defendants.

45. Denies each and every averment in paragraph 44 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 45 as to the other defendants, and therefore denies each and every averment in paragraph 45 respecting the other defendants.

46. Denies each and every averment in paragraph 45 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 45 as to the other defendants, and therefore denies each and every averment in paragraph 45 respecting the other defendants.

47. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 47 and therefore denies each and every averment in paragraph 47.

48. Denies each and every averment in paragraph 48 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 48 as to the other defendants, and therefore denies each and every averment in paragraph 48 respecting the other defendants.

49. In answer to paragraph 49, repeats and reavers all the answers set forth in paragraphs 1 to 48 above.

50. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 50 and therefore denies each and every averment in paragraph 50 respecting the other defendants.

51. Denies each and every averment in paragraph 51 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 51, and therefore denies each and every averment in paragraph 51.

52. Denies each and every averment in paragraph 52 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 52, and therefore denies each and every averment in paragraph 52.

53. Denies each and every averment in paragraph 53 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 53 respecting the other defendants, and therefore denies each and every averment in paragraph 53.

54. In answer to paragraph 54, repeats and reavers all the answers set forth in paragraphs 1 to 53 above.

55. Denies each and every averment in paragraph 55 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 55, and therefore denies each and every averment in paragraph 55.

56. Denies each and every averment in paragraph 56 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 56, and therefore denies each and every averment in paragraph 56.

57. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 57 and therefore denies each and every averment in paragraph 57.

58. In answer to paragraph 58, repeats and reavers all the answers set forth in paragraphs 1 to 57 above.

59. Denies each and every averment in paragraph 59 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 59, and therefore denies each and every averment in paragraph 59.

60. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 60, and therefore denies each and every averment in paragraph 60.

61. Denies each and every averment in paragraph 61 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments respecting the other defendants, and therefore denies each and every averment contained in paragraph 61.

62. Denies each and every averment in paragraph 62 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments respecting the other defendants, and therefore denies each and every averment contained in paragraph 62.

Denies each and every averment in paragraph 62.

63. In answer to paragraph 63, repeats and reavers all the averments set forth in paragraphs 1 to 62 above.

64. Denies each and every averment in paragraph 64 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 64, and therefore denies each and every averment in paragraph 64.

65. Denies each and every averment with respect to Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments respecting the other defendants, and therefore denies each and every averment in paragraph 65.

66. Denies each and every averment in paragraph 66.

67. In answer to the averments in paragraph 67, repeats and reavers all the averments set forth in paragraphs 1 to 66 above.

68. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 68, and therefore denies each and every averment in paragraph 68.

69. Denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 69, and therefore denies each and every averment in paragraph 69.

70. Denies each and every averment set forth in paragraph 70 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 70, and therefore denies each and every averment in paragraph 70.

71. Denies each and every averment in paragraph 71 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 71 respecting the other defendants, and therefore denies each and every averment in paragraph 71.

72. Denies each and every averment set forth in paragraph 72.

73. In answer to paragraph 73, repeats and reavers all the answers set forth in paragraphs 1 to 72 above.

74. Denies each and every averment set forth in paragraph 74, except admits that from time to time customers of The Nice Restaurant gave gratuities to employees for their services.

75. Denies each and every averment in paragraph 75 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments respecting the other defendants, and therefore denies each and every averment in paragraph 75.

76. Denies each and every averment in paragraph 76 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments respecting the other defendants, and therefore denies each and every averment in paragraph 76.

77. Denies each and every averment in paragraph 77.

78. In answer to paragraph 78, repeats and reavers all the answers set forth in paragraphs 1 to 77 above.

79. Denies each and every averment set forth in paragraph 79, except admits that customers from time to time gave gratuities to The Nice Restaurant employees for their services.

80. Denies each and every averment in paragraph 80 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments respecting the other defendants, and therefore denies each and every averment in paragraph 80.

81. Denies each and every averment in paragraph 81.

82. In answer to paragraph 82, repeats and reavers all the answers set forth in paragraphs 1 to 81 above.

83. Denies each and every averment in paragraph 59 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments respecting the other defendants, and therefore denies each and every averment in paragraph 83.

84. Denies each and every averment in paragraph 84 respecting Ben Tom, denies knowledge or information sufficient to form a belief as to the truth of the averments

respecting the other defendants, and therefore denies each and every averment in paragraph 84.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

TO ALL CLAIMS FOR RELIEF

87. Plaintiffs have failed to state a claim for which relief may be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

TO ALL CLAIMS FOR RELIEF

85. All claims are barred by applicable Statutes of Limitation.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

TO THE ALL CLAIMS FOR RELIEF

86. Plaintiffs are barred from recovery by the doctrine of laches.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

TO ALL CLAIMS FOR RELIEF

89. Plaintiffs are barred from recovering by the doctrine of waiver.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

TO ALL CLAIMS FOR RELIEF

90. Plaintiffs are barred from recovering by the doctrine of estoppel.

AS AND FOR A SIXTH AFFIRMATIVE DEFENSE

TO ALL CLAIMS FOR RELIEF

91. Plaintiffs are barred from recovering by the doctrine of unclean hands.

AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE

TO ALL CLAIMS FOR RELIEF

92. Plaintiffs are barred from recovering by the reason of their own illegal conduct.

**AS AND FOR A FIRST CROSS-CLAIM AGAINST
DEFENDANT MEE MEE TOM**

93. In the event that Ben Tom is found liable for any of the claims for relief set forth in the complaint, then Defendant Mee Mee Tom is liable to Ben Tom in contribution.

**AS AND FOR A FIRST COUNTERCLAIM
AGAINST ALL PLAINTIFFS**

94. On information and belief, some or all of the plaintiffs are “employers” as that term is construed under the law. Therefore, to the extent that Ben Tom is liable on any of the claims for relief, they are liable to him in contribution.

WHEREFORE, defendant Ben Tom respectfully demands judgment dismissing the complaint herein, ordering Mee Mee Tom and plaintiffs to reimburse Ben Tom for any amount for which he is liable to plaintiffs, and awarding Ben Tom the costs and disbursements incurred in defending and prosecuting this action.

Dated: July 31, 2007

FREEMAN LEWIS LLP

By: 

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CERTIFICATE OF SERVICE

I, Robert Y. Lewis, hereby certify under penalty of perjury that on August 1, 2007

I caused the attached Answer, Cross-Claim and Counterclaim of Ben Tom in the above

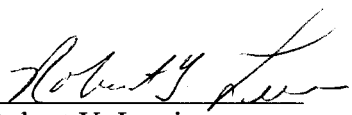
captioned case to be deposited in the United States mails for delivery to:

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Robert Y. Lewis